JAMES W. BOWLING

IBLA 91-40 Decided March 25, 1994

Appeal from a decision of the Dillon, Montana, Resource Area Manager, Bureau of Land Management, requiring compliance with a trespass notice. MTM 78639.

Affirmed.

1. Trespass: Generally

BLM may properly require the removal of structures unintentionally erected in trespass on public land. A party erecting a cabin in trespass on the public lands is liable for the administrative expenses incurred in dealing with the trespass as well as the fair market value rental of the land for the period of trespass.

2. Administrative Authority: Estoppel--Estoppel

A claim of estoppel against the Government will be rejected in the absence of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision.

3. Administrative Authority: Estoppel--Estoppel

While situations may arise where the Government may be estopped because a private party, acting in reliance upon a Governmental representation, was prevented from obtaining a right which might have been obtained, the Government cannot be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance.

APPEARANCES: Larry E. Johnson, Esq., Great Falls, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

James W. Bowling brings this appeal from a September 24, 1990, letter issued by the Area Manager, Dillon, Montana, Resource Area Office, Bureau of Land Management (BLM), denying appellant's request for an extension of time to settle trespass proceedings in the absence of payment of $2,806.63 previously billed in connection with the trespass. The trespass proceedings commenced with a November 1, 1989, trespass notice issued by the BLM Area Manager.

The notice alleged that Bowling had trespassed upon the public lands by erecting a 24- by 36-foot log house and outbuildings, placing personal property in the house and in the outbuildings, and constructing a dam on the east Fork of Granite Creek. The notice indicated that the trespass occurred on public lands situated in the N½ NW¼ NW¼ SE¼ of sec. 25, T. 5 S., R. 3 W., Principal Meridian, Montana, under the jurisdiction of BLM. The notice stated that the existence of the property on the lands constituted an unlawful trespass for which appellant was liable. The amount for which BLM stated appellant was liable is detailed on a bill attached to the notice. 1/ The notice required appellant to remove all property by September 30, 1990, and identified measures BLM would take in the event appellant failed to remove the property. Further, the notice indicated that "[f]ailure to remove said property and resolve your trespass liability by the removal date may result in additional trespass liability and a fine of not more than $1,000 or imprisonment of not more than 12 months, or both, under 43 CFR 9262.1."

Appellant explains in the statement of reasons for appeal that he purchased a large tract of real property in 1988 which included, among other parcels, the N½ of sec. 25. Appellant acknowledges that at the time of purchase he was made aware that 280 acres of BLM property was fenced within the property being purchased, but asserts that the sellers represented to him that the existing fence lines were consistent with the property lines of the property being purchased. At the time of purchase the property was undeveloped and appellant states he intended to construct a residence thereon. Appellant states that at no time was it pointed out that a part of the S½ of sec. 25 owned by the United States was fenced in with his property.

Appellant contends that BLM personnel were consulted regarding a right-of-way across public lands from an existing power line to supply electricity to his new residence. It is asserted that BLM personnel raised no question regarding the location of the property line until after appellant's residence was built upon the public lands. Appellant argues that his encroachment on the public lands was unintended, that BLM was advised of his understanding of the location of the property boundary and his intended location of his residence, and that BLM failed to point out the encroachment until after the residence was built. In these circumstances, appellant claims that BLM is estopped to claim a trespass of the public lands by appellant.

1/ The trespass notice stated that appellant is liable in the amount shown on the attached bill, plus additional administrative costs and rental that may accrue until final settlement of the trespass. The bill identified BLM administrative costs in connection with the trespass in the amount of $2,694.13 and market rental value of the property through Sept. 30, 1990, in the amount of $112.50. The total amount billed was $2806.63.

The record contains an undated file memorandum from a realty specialist that recounts the substance of a telephone call indicating that Montana Power called and disclosed that their survey for the Bowling power line right-of-way revealed that the entire line is on BLM property. 2/ The record indicates that, subsequent to the telephone call from Montana Power, BLM went out and did a property line survey of sec. 25, T. 5 S., R. 3 W., on May 17, 1989. The subsequent BLM appraisal request for the lease rental value of the property related that the recreational home was completed in September 1988 and BLM had "determined last week by a survey that the house was on public land." On June 12, 1989, the BLM Area Manager advised appellant that a recent survey indicated that he was engaging in the unauthorized use of the public land in violation of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (1988), and 43 CFR 2800 and 2920.1-2. He invited appellant to discuss the matter with BLM personnel. In the absence of any resolution of the matter, BLM issued the notice of trespass on November 1, 1989.

[1] It is well established that BLM may properly require the removal of structures unintentionally erected in trespass on public land. Sharon R. Dayton, 117 IBLA 162, 164 (1990); Clive Kincaid, 111 IBLA 224 (1989); Juliet Marsh Brown, 64 IBLA 379, 382 (1982); James E. Billings, 38 IBLA 353 (1978). The regulations at 43 CFR Part 2920 deal with authorized and unauthorized use of the public lands administered by BLM. Under these regulations, a trespasser is liable for administrative costs incurred by BLM as a result of the trespass as well as the fair market value rental of the lands for the period of the trespass. 43 CFR 2920.1-2(a).

With regard to appellant's assertion of estoppel, we note that the Board has followed well established rules governing consideration of estoppel questions. In Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Ptarmigan, Inc. v. United States, No. A 88-467 Civil (D. Alaska, filed Mar. 30, 1990), aff'd, Ptarmigan, Inc. v. United States, No. 90-35369 (9th Cir. May 15, 1991), we stated:

2/ The record also contains a BLM letter responding to an inquiry by Senator Baucus:

"Montana Power Co. requested permission to install one pole on BLM [land], the balance would be buried line across Bowling's land. Fred
Stokke [BLM] met with Bowling and a Montana Power Co. representative to identify any resource conflicts that would prevent approval of the line. Montana Power Company was advised to submit an application as proposed
by Bowling. We had no reason, at this time, to suspect that the power
line to Bowling's house and the house were on BLM-administered land. The Montana Power Company routinely surveys all power lines before construction. It was the power company's survey that alerted us to the possibility that the house had been built on BLM-administered land. Due to the onset of winter we were not able to survey the line until May, 1989. Our survey confirmed that the house had been built on BLM-administered land."
(BLM letter dated May 16, 1990, at 1).

First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970):

> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Harry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 369 (1982); State of Alaska, supra. Third, estoppel against the government in matters concerning public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979)

Ptarmigan Co., 91 IBLA at 117.

[2] Appellant's claim of estoppel falls short of this standard. As a threshold matter, it does not appear that the BLM personnel knew the actual location of the boundary at the time of their conversations with appellant. This knowledge was not obtained until the time of the Montana Power right-of-way survey for the power line. Most significantly, the record fails to disclose any indication of affirmative misconduct on the part of BLM personnel. Appellant has proffered no evidence that BLM representatives purported to represent the actual location of the boundary of the public lands to appellant. In defining the element of affirmative misconduct required to establish estoppel, the Board has held that an erroneous statement of fact upon which reliance is predicated must be in the form of a crucial misstatement in an official written decision. Double J Land and Cattle Co., 126 IBLA 101, 107 (1993); Henry E. Krizman, 104 IBLA 9, 11 (1988); see Heckler v. Community Health Services, 467 U.S. 51, 64 (1984) (no requirement that the Government "ensure that every bit of informal advice given by its agents in the course of such a program will be sufficiently reliable to justify expenditure of sums of money as substantial as those spent by respondent"). Appellant's reliance is simply unreasonable under the circumstances.

[3] There is a further reason why estoppel will not apply in the context of this appeal. It is a well-settled principle that reliance on erroneous or incomplete information supplied by BLM employees cannot create rights not authorized by law. John and Maureen Watson, 113 IBLA 235 (1990); see Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (9th Cir. 1970); Raymond T. Duncan, 96 IBLA 352 (1987). Further, Departmental regulation provides in pertinent part: "[r]eliance upon information or opinion of any officer, agent or employee * * * cannot operate to vest any right not authorized by law." 43 CFR 1810.3(c). Finally, we have held that while circumstances may exist where the Government can be estopped because a private party acting in reliance upon Governmental conduct was prevented from obtaining a right which might have been obtained, the Government can never be estopped where the effect of the estoppel is to grant someone a right which was not available in the first instance. Shama Minerals, 119 IBLA 152 (1991); United States v. Willie White, 118 IBLA 266, 304 (1991); Ptarmigan Co., supra at 117. In Shama Minerals, supra at 156, we refused to permit estoppel where this would result in the granting of a right not authorized by law, the location of mining claims in land not open to mineral appropriation. Similarly, the invocation of estoppel in this case would be to permit an unauthorized use of the public lands. This too cannot be sanctioned. In the first instance appellant would not have been permitted to place his house, improvements, and personal property on public land. It would have been then, as it is now, a trespass.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge